

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 25 September 2006

Public Authority: Maritime and Coastguard Agency
(an executive agency of the Department for Transport)

Address: Bay 3/07
Spring Place
105 Commercial Road
Southampton
SO15 1EG

Summary

The complainant requested a copy of a report prepared by the public authority on the hull of a steamship in the process of construction. The public authority declined relying upon an exemption under section 43(2) of the Freedom of Information Act 2000 ("section 43") indicating that release of the information would prejudice or be likely to prejudice the commercial interests of both the public authority and the builder of the steamship and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner raised a number of enquiries with the public authority regarding both the process of and purpose for the preparation of the report in addition to considering the report itself as a consequence of which the Commissioner finds that the public authority incorrectly applied the section 43 exemption. The public authority is accordingly directed to release the information.

The Commissioner's Role

1. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. On 11 November 2005 the complainant requested the public authority to provide him with "*a copy of the report into the construction of the Loch Tay Steamship, known as the Spirit of Tay*".

On 12 December 2005 the public authority issued a refusal notice in which it acknowledged that it held the requested information but declined to release it upon the basis that an exemption applied under section 43.

On 19 December 2005 the complainant requested an internal review of the refusal.

On 9 January 2006 the public authority confirmed that the review had been undertaken and that the refusal had been upheld on the same ground.

The Investigation

Scope

3. On 28 January 2006 the complainant contacted the Commissioner to complain that the public authority had been wrong in refusing to release the requested information. He maintained that taking into account the paramount consideration of the safety of passengers, the report should be disclosed.

Chronology

4. On 30 May 2006 the Commissioner wrote to the public authority raising a number of questions regarding both the process of and purpose for the preparation of the report. The public authority responded on 10 July 2006.

The Commissioner raised further questions with the public authority on 11 July 2006 which were responded to on 17 July 2006.

The Commissioner has considered the content of the report.

Findings of fact

5. The Commissioner has reviewed the information provided in this case within the following background context:
 - 5.1 The Spirit of Tay is to be a specially built replica steamship intended for use as a tourist attraction involved in pleasure trips on Loch Tay in Scotland. The shipbuilder has been employed by a third party ("the client") to construct the vessel. Due to the size of the vessel it was necessary for the hull to be transported to Loch Tay in sections to be assembled on site.
 - 5.2 It is clear to the Commissioner that a dispute has arisen between the client and the ship-builder and it appears that this relates to standards of workmanship. The assembly work ceased some time ago and the partly-assembled hull remains in that state, visible to the public at the side of Loch Tay. A website which relates to this vessel (<http://www.lochtaysteamheritage.co.uk>) contains press articles and other material relating to this dispute and the role of the public authority.

- 5.3 One of the public authority's statutory duties relates to the control and issue of passenger ship certificates. A passenger ship certificate must be held before passengers (whether fare or non-fare paying) can be carried on a vessel operating as a Class V passenger ship service.

It is the commercial intention that after completion the Spirit of Tay will operate on such a passenger service. Therefore, the public authority has to inspect the ship's hull. This inspection is one of a number of statutory requirements that has to be undertaken as part of the process leading towards the ultimate issue of a passenger ship certificate.

- 5.4 A ship can be built without reference to the public authority. However before such a ship can operate as a Class V passenger ship service the ship owner must provide the public authority with the ship's hull structure drawings, scantling calculations, survey test results and survey report for approval. The public authority would then conduct a structural survey to confirm that the ship conformed to the required standards.

The alternative, as is the case here, is for a shipbuilder to apply to the public authority for survey during the course of the ship's construction. In these circumstances the shipbuilder builds the ship to an agreed standard applying at various key milestones in the ships construction to the public authority to survey the work undertaken. The survey is undertaken by a lead surveyor appointed by the public authority. The surveyor will stipulate the nature of any remedial or other necessary work at any given time.

Fees based on statutory levels are payable to the public authority in respect of its work during these processes.

- 5.5 Irrespective of whether a ship owner or builder applies to the public authority after the completion of or during the course of the construction of a ship the public authority will only issue a passenger ship certificate when it is satisfied that the ship's construction is of the required standard.
- 5.6 In this particular case, the requested information relates to a report by the public authority regarding the weld radiographs on the hull of the vessel.
- 5.7 Although the client has employed the shipbuilder to construct the ship and will have paid deposits for work undertaken legal ownership of the ship at this time remains with the shipbuilder who has not agreed to the disclosure of the information.

Analysis

6. The Commissioner has considered the public authority's response to the complainant's request for information and in particular whether it has correctly applied the exemption under section 43 of the Act.

7. Section 43 provides an exemption from the disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
8. In this case the public authority maintains that both its own commercial interests and those of the shipbuilder would or would likely to be prejudiced by the release of the information.
9. In dealing with the issue of prejudice, or the likelihood of prejudice, the Commissioner considers that the chance of prejudice being suffered should be more than a hypothetical or remote possibility, and that there should be a real and significant risk of prejudice. He further considers that in the event that actual prejudice would be caused the prejudice does not need to be substantial but it must be more than trivial.
10. The Commissioner has considered the report. In technical terms, it sets out the public authority's analysis of the weld radiographs on the hull of the vessel. Any report of this nature inevitably reflects on the workmanship standards of the ship builder and may affect business reputation and customer confidence.

The Commissioner accordingly finds that the release of the information would, or would be likely to, prejudice the commercial interests of the ship builder. However, considerable information about the dispute between the ship-builder and the client is already a matter of public knowledge, and the partly-assembled and currently-abandoned hull is visible to the public. This situation must already have affected the commercial interests of the ship-builder. Having regard also to the substance of the survey report, the Commissioner finds that there would not be substantial **further** prejudice to the commercial interests of the ship-builder arising directly from disclosure of the report.

11. Turning to the public authority's position, the Commissioner notes that the public authority has not raised the possibility of an exemption under any other sections of the Act apart from that under section 43.

During the course of correspondence the Commissioner invited it to explain how its own commercial interests would or would likely to be prejudiced by the release of the information. It responded on 17 July 2006 indicating that it endeavored to maintain a trusting relationship with its customers. Releasing commercial in confidence information it indicated could harm that relationship.

The Commissioner accepts that if shipbuilders are concerned that survey reports may be released during a vessel's construction they may be somewhat circumspect in their dealings with the public authority. Statutory surveys are however obligatory undertakings in that if a passenger ship certificate is sought the shipbuilder has no choice other than to cooperate with the public authority as in this case during the ship building process or in other cases at the end of the process. The certificate must be applied for whatever the state of the shipbuilder's relationship with the public authority.

The Commissioner does not find in this case that the release of this information would or would be likely to prejudice the public authority's commercial interests.

12. The Commissioner accordingly finds that the exemption under section 43 is engaged but only in so far as the release of the information would or would be likely to prejudice the commercial interests of the shipbuilder.

Public Interest Test

13. Section 43 provides a qualified, not an absolute exemption. This means that even though the exemption has been engaged the obligation to disclose the information will still arise unless as stated in section 2(2)(b) of the Act in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.
14. It is important to note that this test relates only to the section 43 exemption. How strong is the public interest in protecting the commercial interests of the shipbuilder? This approach is clear from the case of *Bellamy v the Information Commissioner and the DTI* (Appeal Number EA/2005/0023 FS0066313). In that case, the Information Tribunal clarified that only **relevant** public interest considerations could be taken into account, stating that

"As section 2(2)(b) makes clear, the relevant exercise is to weigh the public interest in maintaining the exemption which is manifested by the relevant provisions against the public interest in disclosing the information. If the weighing process is in favour of the maintenance of the exemption, then any duty to communicate or disclose is disapplied. It necessarily follows that not all public interest considerations which might otherwise appear to be relevant to the subject matter should be taken into account. What has to be concentrated upon is the particular public interest necessarily inherent in the exemption or exemptions relied upon."

15. Applying that approach here, the arguments that the public authority has advanced about its own position are not relevant as the Commissioner has already found that there would be no prejudice to its own commercial interests.

Accordingly account cannot be taken of the general public interest arguments advanced by the public authority namely that disclosure would undermine its ability to fulfill its statutory role, that there is a strong public interest in encouraging full and frank discussions with customers in relation to statutory surveys (the argument being that a spirit of trust needs to exist between the parties which would be eroded should those communications be disclosed), and that it would make it more difficult for others to be able to have dealings with it in relation to surveys such as passenger safety certificates and other statutory surveys. The Bellamy decision makes clear that these arguments cannot be taken into consideration.

16. The public interest considerations which are relevant are finely balanced.

17. There is a public interest in avoiding prejudice to the commercial interests of the shipbuilder and a wider public interest in avoiding undue commercial damage to organisations which are subject to a regulatory scheme of this nature. In this case, the shipbuilder is a commercial organisation, inevitably concerned with its reputation, with customer confidence, with maintaining its revenue and with providing employment. However, the Commissioner has already found that any further prejudice arising directly from disclosure of this technical report would not be substantial. Correspondingly, in all the circumstances of this particular case, the public interest in maintaining the exemption is not strong.
18. A number of competing public interest arguments favouring disclosure can be identified.

The public authority accepts that it is generally in the public interest to be as open as possible thereby ensuring transparency of actions. This allows for public scrutiny of those actions in the fulfillment of its statutory functions.

The survey into the construction of the hull of the vessel is an important factor in confirming the vessel's ultimate suitability as a pleasure boat. Accordingly, even though not immediately focused on safety aspects, the information is important from a public safety aspect. This is an important factor. Public safety considerations provide the underlying rationale for the statutory survey process. No passenger ship certificate can be issued until the public authority is satisfied that the appropriate standard has been reached. The issue of such a certificate is a condition precedent to the carriage of passengers. There is a public interest in transparency to provide public confidence that the surveys which lead to certification are sufficiently rigorous. This is complemented by public confidence from knowledge that surveys which highlight specified issues mean these must be addressed before a certificate can be issued. Maximum transparency improves public confidence in the integrity and robustness of the overall process.

Less directly, the prospect of disclosure will place additional commercial pressures upon shipbuilders to ensure they meet appropriate standards in the interests of public safety. There are some analogies here with publication of restaurant inspection reports by local authority health inspectors.

19. The Act contains a presumption of disclosure. There must be disclosure unless the case for maintaining the exemption outweighs the case for disclosure. In this case, the public interest arguments are finely balanced. However the Commissioner has concluded that in all the circumstances of the case the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

The Decision

20. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

21. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To release to the complainant a copy of the report into the construction of the Loch Tay Steamship, known as the Spirit of Tay.

22. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

24. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 25th day of September 2006

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Relevant Statutory Obligations under the Act

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 2(2)(b) provides that -

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 43 provides that –

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).